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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 848

LYNBROOK GARDENS, INCORPORATED,
Petitioner,

vs.

BERNARD C. ULLMANN

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK IN BEHALF OF THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICI CURIAE.

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INDEX

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
FACTS OF THE CASE	2
IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED	3
ARGUMENT	7
1. A Tax Collection statute affords due process of law though it does not provide for personal service of notice	7
2. In effectuating the process of Tax Collection by sale of tax delinquent property, the Legislature may employ such procedure as it deems reasonable	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

Ballard v. Hunter, 204 U. S. 241, 254-255 (1907)	9
City of Utica v. Proite, 178 Misc. 925 (Sup. Ct., Sp. T., Oneida Co., 941), Aff'd 288 N. Y. 477 (1942)	8
City of Wilmington v. Sprunt, 114 N. C. 310, 19 S. E. 348 (1894)	10
Fay v. Crozer, 217 U. S. 455 (1910)	10
Hersee v. Porter, 100 N. Y. 403, 409-411 (1885)	10
Hagar v. Reclamation District, 111 U. S. 701 (1884)	8
In re Auditor General, 275 Mich. 462, 266 N. W. 464 (1936)	13
Kentucky Union Company v. Kentucky, 219 U. S. 140 (1911)	10
King v. Mullins, 171 U. S. 404 (1898)	10
King v. West Virginia, 216 U. S. 92 (1910)	10
Leigh v. Green, 193 U. S. 79 (1904)	8
Lynbrook Gardens, Inc. v. Ullmann, 291 N. Y. 472 (1943)	1
Matter of City of New York (801-815 E. New York Ave.), 290 N. Y. 236 (1943)	10
Matter of Nichols, 54 N. Y. 62 (1873)	10

	Page
McMillen v. Anderson, 95 U. S. 37 (1877)	8
Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1855)	11
Ontario Land Company v. Yordy, 212 U. S. 152 (1909)	9
Palmer v. McMahon, 133 U. S. 660, 669-670 (1890)	8
Phillips v. Commissioner, 283 U. S. 589 (1931)	11
Pottock v. Mellott, 2 Terry (41 Del.) 361, 22 A. (2d) 843 (1941)	8
Sheldon v. Van Buskirk, 2 N. Y. 473 (1849)	10
Spencer v. Merchant, 125 U. S. 345, 355-356 (1888)	8
Springer v. United States, 102 U. S. 586 (1880)	11
State v. Sponaugle, 45 W. Va. 415, 32 S. E. 283 (1898)	10
Winona & St. Peter Land Co., v. Minnesota, 159 U. S. 526 (1895)	8

Statutes

Act of 1790 (Va.) Ch. 5, § 5	10
Acts of 1893 (N. Car.), Ch. 296, § 1 (Now in N. Car. Code, 1931, § 8004)	10
Art. 7A, Tit. 3, Tax Law of the State of New York (Laws of New York 1939, Ch. 692)	1
Ky. Stats., § 4184 (Now Ky. Rev. Stats., Ch. 135, § 135.010	10
Laws of New York, 1842, Ch. 318	10
Laws of New York, 1941, Ch. 268	10
Mass. Gen. L. Ch. 60, § 29, p. 722	10
Mass. Stats. (1785), p. 568, Ch. 70, § 2	10
New York: Laws of 1788, Ch. 65, Laws of 1801, Ch. 178, Laws of 1816, Ch. 115, 1 Rev. Stats. 397, § 2, Laws of 1835, Ch. 122, Laws of 1843, Ch. 230, Laws of 1882, Ch. 410, § 853, Tax Law, § 71	10
Tax Law, N. Y., § 162	4
W. Va. Act of March 4, 1869	10
W. Va. Code, 1868	10

Other Authorities

Municipalities and the Law in Action (1941)	4
Perfection of Title to Tax Forfeited Lands, New Jersey Municipalities (Magazine)	5
3 Cooley, Taxation (4th Ed)., §§ 1112, 1113, 1120, 1313	8
Xanthaky, "Tax Foreclosure Problems"	5

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STATEMENT

This petition for certiorari seeks review of a final judgment of the New York Court of Appeals in *Lynbrook Gardens, Inc.* v. *Ullmann*, 291 N. Y. 472 (1943), dismissing the complaint in an action for specific performance of a contract for the sale of land. The issue tendered in the cause was the constitutionality of Art. 7-A, tit. 3, of the Tax Law of the State of New York (Laws of New York 1939, ch. 692).

FACTS OF THE CASE

The petitioner acquired title to the property involved by a conveyance from the Village of Lynbrook, which in turn had acquired it in proceedings brought for the foreclosure of tax liens under the provisions of Tax Law, Art. 7-A, tit. 3, entitled "FORECLOSURE OF THE TAX LIEN BY ACTION IN REM." Thereafter, petitioner and respondent entered into a contract for the sale and purchase of the property. At the time set for closing, respondent refused to accept title and resisted petitioner's suit for specific performance on the ground that the tax law which authorized the proceeding *in rem* for the foreclosure of the tax liens contravened the "due process" clauses of the Federal and State Constitutions in that it provided for judgment of foreclosure without personal service of process.

The Court of Appeals held that the complaint should be dismissed because petitioner could not deliver a marketable title. The *ratio decidendi* was stated by the Court as follows (291 N. Y., at p. 477).

> "The question of the validity of the statute has been challenged on substantial grounds. This court can authoritatively determined whether or not the statute violates the provisions of the Constitution of the State of New York; only the Supreme Court of the United States can ultimately determine whether the statute violates the provisions of the Constitution of the United States. Even though this court were to sustain the validity of the statute, the Supreme Court of the United States might still reach a different conclusion. A subsequent purchaser could at any time reject title on that ground and litigate that question in a different forum. A title which can be challenged in that manner is not marketable and decree of specific performance may not be rendered under such circumstances."

IMPORTANCE OF THE CONSTITUTIONAL ISSUE PRESENTED

The question of the constitutionality of the statute is of vital importance to states, municipalities and other taxing authorities all over the country. To carry on the manifold functions of local government, most municipalities rely almost entirely upon the revenues derived from taxes on real estate. The expeditious collection of taxes permits municipalities to realize the amount of levy, and makes it unnecessary to borrow money to carry on the business of government. Conversely, tax delinquency impedes the orderly conduct of municipal affairs on a planned basis and causes increased borrowing, thus adding substantially to municipal indebtedness and expense.

Increase in tax delinquency can be directly traced to statutes which are not strong enough to effect prompt tax collection. Statutes under which many years must elapse before the process of collection against delinquent property can be set in motion, and, in addition, afford the owners of such property several years for redemption from a tax sale, have been found to encourage tax delinquency. The statute in question was designed to cut down the period of delinquency and to place in the hands of municipalities a summary remedy for the collection of taxes and the enforcement of their liens. The statute was further designed to make tax collection simpler and less expensive than at present, and to make certain that titles obtained under the foreclosure procedure would be good and marketable.

In most jurisdictions the tax sale is merely an intermediate step, and the holder of a tax sale certificate cannot obtain title until after a considerable period of time for redemption has elapsed. Moreover, the many complicated jurisdictional steps in the divestiture process result in

questionable titles. Furthermore, a process of foreclosure by plenary suit is expensive and cumbersome.

Tax Law, Art. 7-A, tit. 3, and similar statutes enacted elsewhere, are intended to overcome these evils—first, by providing a summary process of foreclosure in the courts, and second, by providing a more simplified and economical procedure.

The great public importance of the constitutional issue here involved is readily perceived from the fact that in New York State alone, although the statute was enacted as recently as 1939, more than 30 municipalities and other taxing districts have already elected to adopt the provisions of the statute (Tax Law, N. Y., § 162). Many other cities, towns and villages have evinced a desire to make such an election when it becomes certain that the statute is constitutional and that titles obtained thereunder will be marketable.

This brief in support of the petition herein is filed because the unusual and unprecedented action of the New York Court of Appeals involves in doubt the validity—as to the Federal constitution—of state tax foreclosure statutes now in use by member cities of the National Institute of Municipal Law Officers not only in New York but in all states where *in rem* tax foreclosure procedure has been adopted.

The public interest in effective, simple and inexpensive tax collection procedures which comply with all constitutional requirements also makes this case one of great public importance. The New York statute involved in the instant case provides a method whereby tax liens can be foreclosed through such procedures for less than $1.00 per parcel of land. The Corporation Counsel of the City of Jamestown, New York, reported in 1941 that under this law foreclosure "proceedings in the City of Jamestown included 3,811 parcels at a cost of $0.89 for each parcel." Municipalities and The Law in Action (1941), 283. When

this experience under the New York *in rem* statute is compared with the experience in New Jersey where tax liens are foreclosed in a proceedings which is *in personam* in character it is found "The cost of clearing the title under the present procedure varies from $200.00 to $400.00 for each property." *Perfection of Title to Tax Forfeited Lands,* NEW JERSEY MUNICIPALITIES (magazine), May, 1941, page 7.

The economy of the method of foreclosure of tax liens by action *in rem* is further illustrated in comparison with methods of foreclosure by plenary suit similar to that in mortgage foreclosure cases by the following table based on practice and experience in a typical city in the State of New York:

Table of Costs

	Plenary Foreclosure Suit *	*Summary in Rem Suit*
Title Search	$12.50	$00.00
Notice to Redeem	5.00	.25
Tax Search	1.00	1.00
Continuation Title Search	3.50	00.00
Continuation Tax Search	1.00	00.00
Service of Summons and Complaint	5.00	.25
Advertising Fee	28.00	.10
Legal Fees	45.00	3.00
	$101.00	$4.60

* These costs are taken from the official records of a city operating under a statute which eliminates referees' fees and which cuts costs to the very minimum. They are taken from a typical action in which no answer was submitted and judgment taken by default. There was personal service of process and no additional expense of service by publication. XANTHAKY, *"Tax Foreclosure Problems,"* Thirtieth Annual Meeting of the Conference of Mayors of the State of New York.

If this Court upholds the constitutionality of New York's *in rem* statute such action will not only put at rest any doubts which exist in states now having the *in rem* procedure but will also indicate to other states that they may now safely effect a great savings of public tax money by adopting a similar procedure.

ARGUMENT

When the owner of real estate upon which taxes are due has been given due notice of the assessment of the taxes, with an opportunity to be heard, the Legislature, in the exercise of taxing power, may provide for foreclosure of the real property by a municipality through summary action in rem without personal service of process. This does not constitute the deprivation of property without due process of law.

1. A tax collection statute affords due process of law though it does not provide for personal service of notice.

Article 7-A, tit. 3, of the Tax Law contains a complete plan for the collection of taxes by foreclosure of tax liens through a summary action *in rem*. Whenever taxes are due and unpaid for a period of four years, the tax liens may be summarily foreclosed without the necessity for a prior tax sale (§ 165). The tax collecting officer is required to file annually in stated public offices, a list of all property affected by such unpaid tax liens, including a description of the premises, the name of the last known owner and the amount of each tax lien. The Court is given jurisdiction over the *in rem* action authorized by the title. Any person having an interest may redeem before the expiration of a date published in a notice, or may serve an answer setting forth any defense or objection to the foreclosure. In the event of failure to redeem or answer, such person shall be in default, and forever foreclosed of all his right, title and interest in the property, and judgment in foreclosure may be taken (§ 165-a). Upon the filing of the annual lists, the tax collecting officer is required to cause a notice of foreclosure in prescribed form, (1) to be published at least once a week for six successive weeks in two newspapers published in the tax district, (2) to be posted in several conspicuous places, and (3) mailed to the last known owner

(§ 165-b). Mortgagees and other lienors who have filed requests for notice with the tax collecting officer shall also receive mailed notice (§ 165-c). The trial of the issues raised by answer is provided for (§ 165-e), as well as final judgment of foreclosure which may provide for a sale of the property or a deed to the tax district by the tax collecting officer (§ 165-h).

This Court has upheld the constitutional validity of statutes, strikingly similar to the one in question. *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526 (1895); *Leigh* v. *Green,* 193 U. S. 79 (1904). Moreover, the New York Court of Appeals, shortly before the decision in the instant case, had sustained the constitutionality of this very statute and directed specific performance. *City of Utica* v. *Proite,* 178 Misc. 925 (Sup. Ct., Sp. T., Oneida Co., 1941), aff'd 288 N. Y. 477 (1942). See also, *Pottock* v. *Mellott,* 2 Terry (41 Del.) 361, 22 A. (2d) 843 (1941).

The "due process" clause of the Fourteenth Amendment requires that a tax *assessment* statute make provision for notice and an opportunity to be heard. No such requirement exists for a tax *collection* statute. Such a statute, this Court has held, need not provide for any notice to the delinquent taxpayer of any of the steps in the collection process. *McMillen* v. *Anderson,* 95 U. S. 37 (1877); *Hagar* v. *Reclamation District,* 111 U. S. 701 (1884); *Spencer* v. *Merchant,* 125 U. S. 345, 355-356 (1888); *Palmer* v. *McMahon,* 133 U. S. 660, 669-670 (1890); *Winona & St. Peter Land Co.* v. *Minnesota, supra;* 3 Cooley, *Taxation* (4th Ed), §§ 1112, 1113, 1120, 1313.

In *Hagar* v. *Reclamation District, supra,* this Court said (111 U. S., at p. 710):

> "The officers [assessors] in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in

prescribing the time when such complaints will be heard, *gives all the notice required*, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property is due process of law." (Italics ours.)

The statute here involved (Tax Law, Art. 7-A, tit. 3) is concerned only with the *collection* of real estate taxes. The Tax Law makes full provision for notice and hearing before assessment of the taxes (§§ 25, 26, 27, 290). Since the statute guarantees notice and the right to be heard in connection with the *assessment* of the taxes, the constitutional requirements of due process would be satisfied even if the *collection* statute provided for no notice whatever to the delinquent taxpayer. Thus, this statute more than satisfies the requirements of due process of law, for it provides for the giving of notice by publication, posting and mailing (Tax Law, Art. 7-A, tit. 3, § 165-b).

2. In effectuating the process of tax collection by sale of tax delinquent property, the Legislature may employ such procedure as it deems reasonable.

In the statute in question, the Legislature has given all persons claiming to have an interest in the property the right to redeem or to obtain an adjudication, through the Courts, of possible defenses within a limited time after publication of process. Correlatively, the statute enables the taxing authority to obtain a clear title to the property by means of a simple and inexpensive procedure.

Under this statute, it is the land which is accountable for the taxes. The owners must be presumed to have knowledge of the laws relating to the assessment and collection of the taxes. The Legislature is justified, therefore, in providing for ultimate divestiture even without notice to the delinquent owner. *Ontario Land Company* v. *Yordy*, 212 U. S. 152 (1909); *Ballard* v. *Hunter*, 204 U. S. 241, 254-255 (1907).

Many different forms of tax collection have been the subject of legislative enactment. Though often of a drastic and stringent nature, their constitutional validity has been uniformly upheld. Thus, there has been distress of chattels (see, as to New York, Laws of 1788, ch. 65; Laws of 1801, ch. 178; Laws of 1816, ch. 115; 1 Rev. Stats. 397, § 2; Laws of 1835, ch. 122; Laws of 1843, ch. 230; Laws of 1882, ch. 410, § 853; Tax Law, § 71); seizure and sale of the property of third persons in the possession of the delinquent taxpayer (*Sheldon* v. *Van Buskirk,* 2 N. Y. 473 [1849]; *Hersee* v. *Porter,* 100 N. Y. 403, 409-411 [1885]); garnishing a debtor of the delinquent taxpayer (Acts of 1893 (N. Car.), ch. 296, § 1 (now N. Car. Code, 1931, § 8004); Ky. Stats., § 4184 (now Ky. Rev. Stats., ch. 135, § 135.010), held valid and constitutional in *City of Wilmington* v. *Sprunt,* 114 N. C. 310, 19 S. E. 348 (1894); arrest and imprisonment after demand for payment of delinquent taxes (Mass. Gen. L., ch. 60, § 29, p. 722, derived from Mass. Stats. (1785), p. 568, ch. 70, § 2); fine and imprisonment for non-payment (Laws of New York, 1842, ch. 318) imposed in *Matter of Nichols,* 54 N. Y. 62 (1873); outright forfeiture of lands to the State after publication of a list of delinquent taxpayers (Act of 1790 (Va.), ch. 5, § 5; W. Va. Code, 1868; W. Va. Act of March 4, 1869), upheld in *State* v. *Sponaugle,* 45 W. Va. 415, 32 S. E. 283 (1898).

Statutes providing for the outright forfeiture of real property have been sustained by this Court though they did not provide for personal service of notice. *King* v. *Mullins,* 171 U. S. 404 (1898); *King* v. *West Virginia,* 216 U. S. 92 (1910); *Fay* v. *Crozer,* 217 U. S. 455 (1910); *Kentucky Union Company* v. *Kentucky,* 219 U. S. 140 (1911). A statute (Laws of New York 1941, ch. 268) providing for the appointment of receivers of the rents, issues and profits of tax delinquent properties without any notice to the owner has been held constitutional by the New York Court of Appeals. *Matter of City of New York (801-815 E. New York Ave.),* 290 N. Y. 236 (1943).

Ordinarily, a court is without power to grant judgment unless it has acquired jurisdiction over either the person or the subject matter. Jurisdiction over the person is usually obtained by personal service. Jurisdiction over the subject matter may be acquired by publication of process. It should be observed, however, that where courts are vested with jurisdiction in cases of tax collection, they do not act judicially in the strict sense of the word. Their functions really are part of an administrative process. Judicial assistance in those cases is invoked as a matter of convenience,—adequately to protect the rights of taxpayers and to conserve the public interest. This Court has recognized that the necessity for expeditious collection of taxes is such that the sovereign is not required by the Constitution to curb or render ineffective the machinery of tax collection by subjecting it to the delay attendant upon service of process and to lengthy and expensive judicial controversy. The exercise of this power through summary methods of procedure in the Courts with constructive notice to the taxpayer of the institution of proceedings does not constitute a deprivation of property without due process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855); *McMillen* v. *Anderson, supra; Springer* v. *United States*, 102 U. S. 586 (1880); *Palmer* v. *McMahon, supra; Phillips* v. *Commissioner*, 283 U. S. 589 (1931); *Spencer* v. *Merchant, supra.* However, even if it were to be assumed that jurisdiction in tax collection cases is strictly part of the judicial process and not mostly administrative, it is submitted that, as we have shown (*ante* page 9), the requirements of due process are still fulfilled by the provisions of the statute under consideration by publication of due notice of foreclosure in newspapers, the posting of the same in conspicuous places, and the mailing thereof to the last known owner.

Necessity for review by this Court also exists by reason of the conflict in the decisions of the State Courts. In the

case of *In re Auditor General*, 275 Mich. 462, 266 N. W. 464 (1936), *e. g.*, the Court held that a statute providing for publication of a petition and order showing only that a judicial proceeding for the sale of tax delinquent lands was pending, without any description of the lands affected or identification of the owners, effected a deprivation of property without due process of law, in violation of the Federal and State Constitutions. If the view expressed in the foregoing case be followed, the principles so well established by this Court will be nullified.

CONCLUSION

Title to thousands of parcels of property has already passed into the hands of many municipalities and other taxing authorities through the operation of this statute. Hundreds of properties have already been sold by the municipalities to purchasers for value. In turn, many of these have sold the properties to others. The decision of the Court of Appeals herein has the effect of casting serious doubt on the validity of these titles. The fiscal affairs and efficient management of local governments, and the security of the many who have made substantial investments in such properties for homes, businesses and farms, stress the need for determination by this Court of the constitutional question presented.

Respectfully submitted on behalf of the 389 member cities of the National Institute of Municipal Law Officers:

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